MAY 22 PAGE 8

No. 79-6376

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

MARVIN E. BARNETT,

Petitioner,

-vs-

THE STATE OF OKLAHOMA, and
PETER A. DOUGLAS, Warden, et al.,

Respondents.

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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May, 1980

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

MARVIN E. BARNETT, Petitioner,	)	
v.	)	No. 79-6376
THE STATE OF OKLAHOMA, and PETER A. DOUGLAS, Warden, et al., Respondents.	)	

RESPONSE BRIEF OPPOSING
PETITION FOR WRIT OF CERTIORARI

COMES NOW Jan Eric Cartwright, Attorney General for the State of Oklahoma, by and through C. Elaine Alexander, Assistant Attorney General, on behalf of the above-named respondents, and in opposition to the Petition for Writ of Certiorari, and submits to this Honorable Court the following brief in opposition thereto.

I.

JURISDICTION

Petitioner Barnett seeks review by way of a pro se Petition for Writ of Certiorari from a decision rendered by the United States Court of Appeals for the Tenth Circuit. On the 7th day of March, 1980, a three-member panel of the aforesaid Court, composed of Judges Seth, Pickett and McWilliams, in Case No. 79-1283 affirmed the denial of habeas corpus relief rendered by the Honorable Fred Daugherty, United States District Judge for the Western District of Oklahoma, in Case No. CIV-78-1006-D.

II.

ISSUES PRESENTED

1. Whether Petitioner Barnett was denied the statutory right to direct appeal in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

2. Whether Petitioner Barnett was denied effective assistance of counsel upon appeal in violation of his Sixth and Fourteenth Amendments rights established by the United States Constitution.

3. Whether Petitioner Barnett was denied his right to access to the courts in violation of the Fifth and Fourteenth Amendments of the United States Constitution by the refusal to furnish a transcript at public expense after the appeal time had expired.

III.

STATEMENT OF THE CASE

Petitioner, Marvin E. Barnett, hereinafter referred to as "Mr. Barnett", was charged by Information with Murder in the First Degree, in violation of Okla. Stat. tit. 22, § 701 (1961), in the District Court of Oklahoma County, State of Oklahoma. Mr. Barnett was tried by jury on June 14 through 26, 1965, and was duly represented by privately retained counsel from arraignment through the appeal time period. The jury thereafter returned a verdict of guilty and assessed punishment at life imprisonment under the custody and control of the Department of Corrections.

Mr. Barnett failed to perfect his appeal from the aforesaid Judgment and Sentence to the Oklahoma Court of Criminal Appeals within the time set forth in Okla. Stat. tit. 22, § 1054 (1965) and Okla. Stat. tit. 22, § 1055 (1961).

On October 19, 1965, Mr. Barnett filed an application for case-made at public expense which was overruled by the trial court for failure to give notice of intent to appeal as provided in Okla. Stat. tit. 22, § 1060 (1965). Thereafter an Application for Post-Conviction Relief, Case No. A-14,508, and a Writ of Habeas Corpus, Case No. A-14,727, were filed by Mr. Barnett on the issues raised herein in the Oklahoma Court of Criminal Appeals. Combining two separate petitions for dispostion, the Oklahoma Court of Criminal Appeals denied Mr. Barnett the requested relief, the decision rendered being recorded in the official reporter as Barnett v. State, 446 P.2d 89 (Okl.Crim. 1968). Once again, in 1978, Mr. Barnett raised the identical issues in an Application for Post-Conviction Relief in the District Court of Oklahoma County, Oklahoma, which denied the Application. That denial was appealed to the Oklahoma Court of Criminal Appeals, pursuant to Okla. Stat. tit. 22, § 1080 et seq., the Oklahoma Post-Conviction Procedures Act, in Case No. PC-78-439, who affirmed the denial.

Mr. Barnett thereafter filed a Writ of Habeas Corpus in the United States District Court for the Western District of Oklahoma, Case No. 78-01006-D. The Honorable Fred Daugherty found that no constitutional violation had occurred and denied the Writ. That denial was appealed to the United States Court of Appeals for the Tenth Circuit in Case No. 79-1283. Assigned to Calendar D, the issue was presented to a three-member panel, Judges Seth, Pickett and McWilliams, by briefs without oral argument. On March 7, 1980, the Tenth Circuit panel affirmed the lower federal court's ruling.

It is from that judgment that Mr. Barnett now comes to this Honorable Court requesting the following relief:

> 1. The grant of the Writ of Certiorari to review the denial of habeas corpus relief by the Tenth Circuit Court of Appeals in Case No. 79-1283 rendered on March 7, 1980; and
>
> 2. Vacation of the final Judgments in Case Nos. PC-78-439, A-14,508, A-14,727, rendered by the Oklahoma Court of Criminal Appeals and Case No. 78-01006-D, rendered by the United States District Court for the Western District, with orders to grant him full appellate review.

IV.

STATEMENT OF THE FACTS

The relevant facts pertaining to the issues presented herein indicate that this matter came on for jury trial in 1965, State of Oklahoma v. Marvin Eugene Barnett, Case No. 30130, and that Mr. Barnett was represented by privately retained counsel throughout all the proceedings. On the date of formal sentencing, July 3, 1965, Mr. Barnett through his counsel gave oral notice of intent to appeal and the trial court gave him an additional sixty (60) days to have a case-made prepared. Mr. Barnett at that time advised that trial court that he did not wish an attorney appointed to perfect his appeal nor a transcript at public expense. No written notice of intent to appeal was ever filed as required by Okla. Stat. tit. 22, § 1060 (Supp. 1965), nor was the appeal perfected to the Oklahoma Court of Criminal Appeals within the statutory time period as provided in Okla. Stat. tit. 22, § 1054 (Supp. 1965). The record fails to establish that Mr.

Barnett's privately retained counsel withdrew from the case or that Mr. Barnett ever informed the trial court of a need for court-appointed counsel or case-made within the statutory appeal time.

ARGUMENT AND AUTHORITY

MR. BARNETT WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE DENIAL OF DIRECT APPEAL AFTER THE EXPIRATION OF THE STATUTORY TIME.

Mr. Barnett sets forth three propositions for review which are in reality a splintering of the one issue of whether the State of Oklahoma may refuse direct appellate review to a person who fails to perfect his appeal within the statutory time limits when the failure is not the result of any state action. Mr. Barnett incorrectly sets forth the Fourth Amendment as the alleged constitutional violation. The interference by a state with the appeal right, access to courts, falls under the Fifth Amendment's due process right, and the ineffective assistance of counsel on direct appeal comes under the rubric of the Sixth Amendment of the United States Constitution.

In McKane v. Durston, 153 U.S. 684 (1894), this Court established that there was no absolute constitutional right to appeal independent of the state's freedom to determine statutory limits. The traditional principle is that a state was not required to allow any appeal for criminal defendants. See Ross v. Moffitt, 417 U.S. 600, 606 (1974); Griffin v. Illinois, 351 U.S. 12, 18 (1956); and Johnson v. United States, 291 A.2d 697, 698 (D.C. 1972). Once the state has granted the appellate right, they may not discriminate upon the basis of inability to pay. See Douglas v. California, 372 U.S. 353, 355 (1963); Burns v. Ohio, 360 U.S. 252, 258 (1959); Griffin v. Illinois, supra; and Anders v. California, 386 U.S. 738, 741 (1967).

Where the defendant has court-appointed counsel, there is sufficient state action to hold any subsequent failure to perfect a direct appeal a deprivation of due process rights. See Turner v. North Carolina, 412 F.2d 486 (4th Cir. 1969); and Scobie v. State, 239 F. Supp. 646 (E.D. Okl. 1965). Similarly, a deprivation of

the due process right to an original appeal may occur when the defendant is uninformed of his rights to a court-appointed attorney, transcript at public cost, and the time limitations even if his counsel is privately retained. For the right to appeal or the decision to abandon it is a person right which no attorney may make for his client. See Boyd v. Cowen, 494 F.2d 338 (6th Cir. 1974), on remand 519 F.2d 182 (6th Cir. 1975); Maselli v. Reinsake, 383 F.2d 129 (2nd Cir. 1967); Chapman v. United States, 469 F.2d 634 (5th Cir. 1972); and Atilus v. United States, 406 F.2d 694 (5th Cir. 1969).

Where there is an affirmative showing that the defendant had been advised of his appellate rights, as in the instant case, the trial court is justified in assuming that the privately retained counsel will protect those rights and that the defendant, aware of those rights, will zealously guard those rights. See Peoples v. United States, 337 F.2d 91 (10th Cir. 1964); and Hannigan v. United States, 341 F.2d 587 (10th Cir. 1965).

When the informed petitioner selects his own counsel who represents him throughout trial and in subsequent proceedings, the failure of his retained counsel to file a notice of intent to appeal or perfect the appeal through suitable arrangement, no habeas corpus action will lie for constitutional deprivation. See Plaskett v. Page, 439 F.2d 770 (10th Cir. 1971); McKee v. Page, 435 F.2d 689 (10th Cir. 1970); Buchanan v. State of Oklahoma, 370 F.2d 199 (10th Cir. 1968); and Schechter v. Waters, 199 F.2d 318 (10th Cir. 1952).

CONCLUSION

Mr. Barnett was informed, as indicated by the record, of his right to court-appointed counsel and case-made at public expense, which he refused. He was also given additional time of sixty (60) days past the six month limit in which to perfect his appeal. Oral Notice of Intent to Appeal was given at the formal sentencing hearing but no written notice was given within ten (10) days. Mr. Barnett failed to notify the trial court of any change in his financial ability or to indicate any need for court-appointed counsel. The State of Oklahoma contends that for the foregoing

reasons, no due process rights of Marvin E. Barnett have been violated; and, therefore, the Petition for Writ of Certiorari should be denied by this Honorable Court.

Respectfully submitted

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STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

I, CAROL ELAINE ALEXANDER, depose and state that I am an attorney in the office of Jan Eric Cartwright, Attorney of record for Respondents herein, and that on May 6th, 1980, pursuant to Rule 33 of the Rules of the Supreme Court, I served one copy of the foregoing brief, by mailing a copy in a duly addressed envelope, wth First Class postage prepaid, to the following named petitioner acting pro se:

Marvin E. Barnett, #72361
Route 1, Box 260
Lexington, OK 73051

C. Elaine Alexander
C. ELAINE ALEXANDER

Subscribed and sworn to before me this 6th day of May, 1980.

Virginia A. Hampton
NOTARY PUBLIC

My Commission Expires:

June 7, 1982

mag